Office-Supreme Court, U.S.
FILED
JAN 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-920 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL ROBINSON, *et al.*,
Petitioners,
v.
STATE OF NEW JERSEY, *et al.*,
Respondents.

JOSEPH W. ANTONACCI, *et al.*,
Petitioners,
v.
STATE OF NEW JERSEY, *et al.*,
Respondents.

ALLEN OLSEN, *et al.*,
Petitioners,
v.
STATE OF NEW JERSEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

ROBERT H. CHANIN
JAMES J. BRUDNEY
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
Counsel for the National Education Association

PAUL SCHACHTER
744 Broad Street
Newark, New Jersey 07102
(201) 623-1600
Counsel for Rutgers Council of AAUP

ANN H. FRANKE
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900
Counsel for the American Association of University Professors

JAMES B. COPPESS
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel for Communications Workers of America, AFL-CIO

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Whether the court of appeals correctly rejected the contention that the New Jersey Employer-Employee Relations Act is facially unconstitutional in that it authorizes a union that has been selected as the majority representative to expend representation fees, over objection, for "lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer."

Whether the court of appeals was correct in concluding that by providing both an advance reduction of fees and interest-bearing escrow accounts to hold a portion of the fees paid by objectors, the demand and return systems implemented by the defendant unions under the New Jersey Act provide "the principal protections required by *Ellis* [v. *Railway Clerks*] and the *Mathews* [v. *Eldridge*] due process case law."

Whether the district court committed an error of law in issuing a preliminary injunction against the collection from the plaintiffs of any representation fees pursuant to the New Jersey Act.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. The Court of Appeals Correctly Applied the Teachings of *Abood* and *Ellis* to the Realities of Public Sector Labor Relations in New Jersey in Sustaining the Act's Authorization of the Use of Representation Fees for the Defined Employment-Related Lobbying Activities	5
II. The Court of Appeals Was Correct in Finding That the Demand and Return Systems Implemented by the Defendant Unions Under the New Jersey Act Provide "the Principal Protections Required by *Ellis* [v. *Railway Clerks*] and the *Mathews* [v. *Eldridge*] Due Process Case Law"	10
III. The Court of Appeals Correctly Held That An Injunction Against Collection of Representation Fees Should Not Have Issued	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977) ..... *passim*
Champion v. *State of California*, 738 F.2d 1082 (9th Cir. 1984) 10, 16
Dean v. *Air Line Pilots*, 708 F.2d 486 (9th Cir. 1983) 16
Ellis v. *Railway Clerks*, 104 S.Ct. 1883 (1984) ..... *passim*
Hudson v. *Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir. 1984) 14
Lullo v. *Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 268 (1970) 7
Machinists v. *Street*, 367 U.S. 740 (1961) 15
New Jersey v. *State Supervisory Employees Ass'n*, 78 N.J. 54, 393 A.2d 233 (1978) 7
Perry v. *Machinists Local Lodge 2569*, 708 F.2d 1258 (7th Cir. 1983) 16
Policemen's Benevolent Ass'n v. *PERC*, 187 N.J. Super. 202 (App. Div. 1982) 7
Railway Clerks v. *Allen*, 373 U.S. 113 (1963) 15
School Committee of Greenfield v. *Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982) 14

United States Constitution:

First Amendment 3, 8, 11

Statutes:

New Jersey Employer-Employee Relations Act
N.J.S.A. 34:13A-5.5 ..... 2, 5, 9
N.J.S.A. 34:13A-5.6 ..... 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-920

PAUL ROBINSON, *et al.*,
Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,
Respondents.

JOSEPH W. ANTONACCI, *et al.*,
Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,
Respondents.

ALLEN OLSEN, *et al.*,
Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT UNIONS

The American Association of University Professors, the Rutgers Council of AAUP, the Communications Workers of America, AFL-CIO, and the National Education Association, defendants in the court below and respondents in this Court, submit that the plaintiffs' petition for a writ of *certiorari* should be denied and jointly file this brief in opposition to the petition.

STATEMENT OF THE CASE

These cases involve a constitutional challenge to the facial validity of the provisions in the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.5 and 5.6, App. 194a-196a, which allow a limited form of union security in that State's public sector labor relations.

a. The New Jersey Act allows public sector employers and labor unions to include in a collective bargaining agreement a provision requiring nonmember employees covered by the agreement to pay "a representation fee in lieu of dues for services rendered by the majority representative." N.J.S.A. 34:13A-5.5a. This representation fee may not exceed 85 percent of regular membership dues. N.J.S.A. 34:13A-5.5b. Additionally, nonmembers have the right to demand and receive from the majority representative the return of any part of their fee that would be attributable to union expenditures for "activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment." And, the New Jersey legislature expressly directed that the returnable amount shall not include:

> the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer. [N.J.S.A. 34:13A-5.5c.]

The Act requires that the majority representative establish a "demand and return" system for calculating the amount to be returned to the objecting nonmember. The statute further requires that this calculation be subject to review through "full and fair proceedings placing the burden of proof on the majority representative." N.J.S.A. 34:13A-5.6. These proceedings must "provide for an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate, . . ." *Id.* The decisions of

this board are subject to review by appeal to the state courts.

b. Each of the union defendants in these cases has implemented a demand and return system as required by the Act. These systems provide for internal review by neutral third parties as well as for public review by the Appeals Board created by N.J.S.A. 34:13A-5.6. In addition, each system provides that a portion of any objector's fee payment, sufficient to guarantee against temporary subsidization of activities not germane to collective bargaining, will be held in an interest-bearing escrow account pending payment of any "return" due under the terms of the statute. App. 169a-172a.

c. In ruling on the plaintiffs' motions for preliminary injunctions, the district court found the New Jersey Act unconstitutional on its face in two respects. First, the district court held that by authorizing the use of representation fees to defray a pro rata share of the costs of the employment-related lobbying activities referred to above, the Act violates the First Amendment. App. 48a. Second, the district court found that the demand and return systems instituted by the defendant unions under the Act failed to satisfy constitutional requirements because, in the district court's view, "no demand and return system can protect an objecting nonmember's First Amendment rights." App. 124a. On the basis of these rulings, the district court entered an injunction freeing plaintiffs entirely from paying any representation fee until the New Jersey statute is amended in line with the district court's opinions. App. 148a.

The court of appeals reversed the district court and vacated its injunction. First, the court of appeals unanimously held that the lobbying activities for which representation fees could be used under the Act are "pertinent to the duties of the union as a bargaining representative," and that this statutory authorization is "a legitimate means of achieving the state interest in labor peace and does not unnecessarily burden the First Amendment

rights of representation fee payers." App. 160a, 161a. Second, with one judge dissenting, the court of appeals concluded that the "demand and return systems authorized by state statute and implemented by the defendant-unions" provide "the principal protections required by *Ellis* [v. *Railway Clerks*, 104 S.Ct. 1883 (1984)], and the *Mathews* [v. *Eldridge*, 424 U.S. 319 (1976)] case law." App. 163a, 169a.[1] Finally, the court of appeals observed that the broad injunctive relief granted by the district court was contrary to this Court's repeated directions on appropriate remedies in cases of this sort. The court noted, in addition, that the record contained no evidence of likely harm to the plaintiffs warranting preliminary injunctive relief. The case was remanded to the district court to determine whether the escrow procedures adopted by the defendant unions, in combination with the Act's 15% advance reduction in fees, are sufficient to protect objectors from forced loans to the unions for nonchargeable expenditures. App. 172a.

REASONS FOR DENYING THE WRIT

The court of appeals ruled on three issues in deciding this case—(i) the validity of New Jersey's express inclusion of defined employment-related lobbying among the activities to be financed, over the objection, by a portion of the representation fees; (ii) the adequacy of the demand and return systems implemented by the unions here; and (iii) the propriety of the district court's injunction relieving plaintiffs entirely of their obligation to pay representation fees.

None of those rulings warrant further review. Each represents a careful and conscientious application of this Court's decisions in *Ellis* v. *Railway Clerks*, 104 S.Ct. 1883 (1984), and *Abood* v. *Detroit Board of Education*,

[1] The dissenting judge declined to consider whether the plaintiffs in fact had been accorded proper due process protection under the Act, because she concluded that the Act was fatally defective on its face for failing to expressly require these protections. App. 176a-185a.

431 U.S. 209 (1977), to the facts of this case. The decision below establishes no principles of law beyond those established in *Ellis* and *Abood*; the court of appeals' application of *Ellis* and *Abood* here is entirely consistent with this Court's decisions. Finally, there is no conflict among the lower courts as to the application of *Ellis* and *Abood* to the issues decided below and raised in the *certiorari* petition.

I. The Court of Appeals Correctly Applied the Teachings of *Abood* and *Ellis* to the Realities of Public Sector Labor Relations in New Jersey in Sustaining the Act's Authorization of the Use of Representation Fees for the Defined Employment-Related Lobbying Activities.

a. The New Jersey Act allows a majority representative of public employees in that State to finance a narrow range of employment-related lobbying with the fees paid to the representative by all represented employees, *viz.*, "lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer." N.J.S.A. 34:13A-5.5c; App. 195a.

This provision of the Act represents the judgment of the New Jersey legislature that this employment-related lobbying by public sector unions is a vital component of that State's labor relations system and that it promotes labor peace to allow union security agreements requiring that all represented employees contribute to their union's efforts in this regard. The court of appeals unanimously held that the United States Constitution does not preclude the decision of the State legislature in this regard. This conclusion was drawn from a close analysis of this Court's decisions addressing constitutional use of fees paid by objecting employees and of the practical requirements of New Jersey's system of labor relations.

In *Abood*, this Court recognized that, "The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." 431 U.S. at 236. The court of appeals took account of this practical reality by recognizing that,

> Taken as a whole, the agency fee case law points to a focus on collective bargaining as a process whereby unions must advance the collective interests of their members in a number of arenas. * * * Public employee bargaining is distinctive in that at least a portion of a union's attention is directed away from the bargaining table, even for what would be designated the standard terms and conditions of employment under the NLRA. . . . [App. 155a-156a.]

An examination of collective bargaining in New Jersey led the court of appeals to conclude that the employment-related lobbying expenditures authorized by the New Jersey Act are a necessary part of that State's labor relations system:

> For New Jersey public employees, collective bargaining is inextricably intertwined with legislative change. An examination of the mechanics of New Jersey's public employee collective bargaining agreements reveals to what extent the standard terms and conditions of employment under the NLRA or the RLA are governed by state statute or regulation. *Cf. Fibreboard Paper Products* v. *NLRB*, 379 U.S. 203 (1964); R. Gorman, *Basic Text on Labor Law* 496-523 (1976) (review of mandatory subjects of bargaining under NLRA). For example, an affidavit submitted by M. Don Sanchez, the New Jersey Area Director of the CWA, in the *Olsen* proceeding, listed no fewer than fifteen traditional subjects of bargaining that are governed by New Jersey statutes, civil service rules, administrative regulations, or execu-

> tive orders. Among these are pensions, overtime, subcontracting, employee transfers, safety and health, medical plans. App. at 101-15.
>
> Since many of the essential terms and conditions of employment that are mandatory subjects of bargaining under Sections 8(d) and 9(a) of the NLRA are governed by state authorities in the public employment context, a public employee union unable to lobby the state authority would be severely handicapped in performing its duties as a bargaining representative. [App. 159a-160a; footnote 10 omitted.] [2]

Statutes and regulations that establish "terms and conditions of employment" in the New Jersey public sector are effectively incorporated into collective bargaining agreements, *New Jersey* v. *State Supervisory Employees Ass'n*, 78 N.J. 54, 393 A.2d 233, 246 (1978); issues covered by these statutory and regulatory provisions, like those covered by directly negotiated provisions, are subject to the agreement's grievance procedure, *Township of West Windsor* v. *PERC*, 78 N.J. 98, 393 A.2d 255, 264 (1978). Thus, not only are New Jersey public sector unions precluded from reaching agreements altering terms and conditions covered by such statutes and regulations, but the unions also become responsible for enforcing the terms of these statutes and regulations through the grievance procedure. *See Lullo* v. *Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 268, 694 (1970).

---

[2] Footnote 10 to this passage quotes from the affidavit referred to in the text elaborating on the relationship between lobbying and representing New Jersey public employees. App. 159a, n.10. That affidavit also explains that it is a common practice in the New Jersey public sector for unions and employers to include in their collective bargaining agreements a provision requiring joint union-employer lobbying efforts to secure changes in regulations or legislation necessary to validate any other term of the agreement. (Sanchez aff. ¶ 48 and Exhibit 1A Articles III & XL.) This practice has been approved by the New Jersey courts. *See Policemen's Benevolent Ass'n* v. *PERC*, 187 N.J. Super. 202, 453 A.2d 1373 (App. Div. 1982), *cert. denied*, 93 N.J. 269, 460 A.2d 672 (1983).

Because the subject matter of the lobbying allowed by the New Jersey Act is in essence the same as the subject matter that is dealt with at the bargaining table in the private sector under federal statutes, the court of appeals found no greater infringement of an objector's rights in allowing the payments to be used for the former than for the latter:

> So long as the lobbying activities are pertinent to the duties of the union as a bargaining representative and are not used to advance the political and ideological positions of the union, lobbying has no different constitutional implication than any other form of union activity that may be financed with representation fees. [App. 160a.]

The court of appeals thus tracked the mode of analysis established in *Ellis* for deciding First Amendment questions concerning the use of an objector's representation fees—considering first "whether these expenses involve additional interference with the First Amendment interests of objecting employees" beyond that already countenanced by allowing such expenditures "in support of activities germane to collective bargaining," and, also, to the extent there is any additional interference with these interests, whether it is "adequately supported by a governmental interest." 104 S.Ct. at 1896. And that court summarized the lessons to be drawn from *Ellis* in the following terms:

> *Ellis* confirms the basic tenet of the RLA trilogy and *Abood*: the First Amendment is not an insuperable obstacle to the effective representation of a bargaining unit by a union, either in the private or public sectors. Unions advancing the collective interests of the employees they represent need not shoulder the financial burden of non-members simply because effective representation necessarily includes taking positions on the issues affecting the membership. To conclude otherwise would diminish the expressive rights of the majority of employees whose full union contributions would be depleted to cover the costs in-

curred in the representation of free riders. Such a result is not required by the First Amendment. [App. 162a-163a.]

b. In their petition, the plaintiffs proceed as if it were sufficient to impeach the court of appeals to show that the court below permitted expenditure of an objector's fees on an activity beyond face to face negotiations at the bargaining table. Pet. 10-15. But this proposition cannot be squared with this Court's recognition in *Abood* that establishing a collective bargaining agreement in the public sector may require more than "merely concord at the bargaining table." 431 U.S. at 236. Moreover, plaintiffs' line of argument flies in the face of the constitutional analysis in *Ellis*. For if it were true that an objector's fees may not constitutionally be used for activities away from the bargaining table, it would be pointless to consider, as *Ellis* requires, whether expenditures for activities beyond this "involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." 104 S.Ct. at 1896.

The plaintiffs do not even purport to argue with the court of appeals' approval of the New Jersey legislature's assessment of the practical necessities for public sector collective bargaining in that State.[3] And rather than address the court of appeals' application of this Court's

[3] Throughout point 1 of their argument, Pet. 10-15, plaintiffs mischaracterize the New Jersey statute by suggesting that it would allow an objector's fees to be used for such political purposes as contributions to candidates or other partisan activities. *See, e.g.*, Pet. 13-14 n.9. It is clear from the terms of the Act that unions would not be allowed to use an objector's fees for such purposes. N.J.S.A. 34:13A-5.5 c; App. 194a-195a. Nothing said or done by either the court of appeals or the district court is to the contrary. In any event, even were it not clear from the face of the Act that such partisan political expenditures are not permitted over objection, the scope of expenditures permitted by the New Jersey Act should be determined in the first instance by the New Jersey courts construing it. *See Abood*, 431 U.S. at 232-233.

teachings in *Abood* and *Ellis* to the issue of employment-related lobbying expenditures, plaintiffs address this issue in only the most abstract and general terms. Pet. 10-15. Moreover, the analysis and conclusion of the court below are consistent with those of the only other court of appeals to address this question. *Compare Champion* v. *State of California*, 738 F.2d 1082, 1085-1086 (9th Cir. 1984), *pet. for cert. filed*, No. 84-1010 (December 24, 1984), *with* App. 148a-163a. In short, there is nothing to suggest that the decision of the court below on this question is in conflict with the decisions of this Court or that this case otherwise warrants this Court's review of this question.

II. The Court of Appeals Was Correct in Finding That the Demand and Return Systems Implemented by the Defendant Unions Under the New Jersey Act Provide "the Principal Protections Required by *Ellis* [v. *Railway Clerks*] and the *Mathews* [v. *Eldridge*] Due Process Case Law."

a. The court of appeals held that by providing *both* an advanced reduction from regular dues of the amount nonmembers are required to pay *and* an interest-bearing escrow account for a portion of the reduced payment, the demand and return systems implemented by the defendant unions under the New Jersey Act meet the requirements for such systems set forth in *Ellis*, 104 S.Ct. at 1890, to protect against the temporary misuse of an objector's fees:

> *The challenged representation fees in the present litigation incorporate both of the protective mechanisms approved by Ellis.* By statute, there is a fifteen percent differential between the amounts chargeable to fee payers and the union dues of full union members; the ceiling on fees to the former is set at 85 percent of the dues of the latter. In addition, each of the defendant-unions has created an escrow system for a portion of the representation fee. In order for the representation fees collected by the unions to be susceptible to constitutional challenge, therefore, the expenditures for political and

> ideological activities by them must exceed the sum of the fifteen percent statutory 'cushion' and the amount escrowed by the union. [App. 167a; footnote 12 omitted, emphasis added.] [4]

The court of appeals found that "[n]ot only is the record devoid of any proof of actual harm suffered by the plaintiffs here [in terms of being required to make involuntary loans to subsidize nonchargeable activities], but the combination of the advanced reduction and the escrow systems adopted by the unions demonstrates the contrary." App. 175a.

Given the court of appeals' conclusion that there is no risk that an objecting employee represented by the defendant unions might be required to subsidize temporarily union activities that the employee has a right not to support, the sole remaining issue is whether the possibility that the employee may be temporarily deprived of the use of a portion of the funds held in escrow renders the demand and return systems unconstitutional. The court of appeals showed that this possibility does not raise substantial First Amendment problems, App. 163a-165a, but rather should be analyzed in the same due process terms this Court has used to evaluate other indistinguishable state-sanctioned procedures that permit a temporary deprivation of property:

> Even assuming some cognizable harm occasioned by the temporary deprivation of a small amount of

---

[4] Footnote 12 to this passage answers the argument of the dissent below that the Act on its face must require the type of escrow arrangements implemented by the unions here. As the majority points out, the Act on its face does require one of the "acceptable alternatives" suggested in *Ellis*, *i.e.*, an "advance reduction" of fifteen percent. And, since in this case the Act has been implemented so as to provide the other "acceptable alternative" in addition (the systems here provide for both advance reduction and interest-bearing escrow accounts), there is no reason for the *federal* court in passing on *New Jersey*'s statute to decide the constitutional question, addressed by the dissent, of whether the 15% reduction by itself would be adequate.

> returnable fees, adequate post-deprivation procedures may suffice to withstand the constitutional challenge. * * * In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court sanctioned the discontinuation of disability benefits prior to a full evidentiary hearing. The Court reasoned that the notice provisions of the challenged social security termination procedure combined with the "fairness and reliability of pre-termination procedures," 424 U.S. at 343, rendered the likelihood of harm remote and the extent of actual harm, were it to occur, *de minimis*. [Citation omitted.]
>
> Based upon *Mathews* and its progeny, we conclude that the constitutional infirmity of the demand and return systems, if any, depends on the adequacy of the return arrangements . . . . [T]he question is one of the due process protections in the assessment of the withholding and the adequacy of the post-withholding return systems. [App. 165a-166a.]

And the court of appeals did undertake such an assessment, concluding:

> An examination of the demand and return systems adopted by the defendant unions reveals that the principal protections required by *Ellis* and the *Mathews* due process case law are already in existence. [App. 169a.]

The court of appeals was clearly correct in this regard. Without reciting every feature of the demand and return systems adopted by the defendant unions, *see, e.g.*, App. 169a-172a, we simply note that each system incorporates the following protections against interference with the rights of objecting fee payers: non-members are charged no more than 85% of regular membership dues; upon objection, a portion of the objector's representation fee sufficient to guarantee that fees are not used temporarily to subsidize non-chargeable activities is held in an interest-bearing escrow account pending return; the cal-

culation of the amount to be returned is initially made in a manner that to the maximum extent possible insures accuracy; this initial calculation is subject to public review before the New Jersey Appeals Board created by the Act, with the union bearing the burden of proof; and an objector is entitled to seek judicial review of decisions of the public Appeals Board.

Given that nonmembers receive an advance reduction of 15%, it is unlikely that an objector would be entitled to any significant return at the end of the year. App. 171a-172a.[5] And the temporary deprivation of this small amount is compensated by the interest on the escrow account in which a portion of the objector's fee is held. In these circumstances, the greater accuracy obtained by calculating the amount to be returned at the end of the year, after the unions' "numerous and shifting expenditures", *Abood*, 431 U.S. at 241, are known, justifies the possible temporary deprivation.

b. In their petition, plaintiffs erroneously assert that the decision of the court of appeals regarding the ade-

---

[5] The court of appeals stated:

> The CWA introduced evidence to show that based upon its elaborate accounting procedures, which were not challenged in the district court, it was ascertained that the New Jersey locals spent between 15.01 per cent and 23.76 per cent of their budgets on arguably non-collective bargaining issues. Thus the "deprivation" suffered by any employee whose funds were escrowed would be between 0.01 per cent and 8.76 per cent of the allowable representation fee. The union also calculated that the monetary value of this "harm" would be between $0.02 and $18.00 per year, depending on the local involved. [App. 171a-172a; footnote 14 omitted.]

Footnote 14 to this passage points out that the calculation included all lobbying expenditures within the rebatable amount returned, and that these figures, therefore, would be reduced upon recalculation in line with the court of appeals' opinion. The defendant CWA holds 40% of the objector's fee in escrow, an amount greatly in excess of that found to be returnable. App. 171a.

quacy of the demand and return systems is in conflict with *Hudson* v. *Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir. 1984), and *School Committee of Greenfield* v. *Greenfield Education Ass'n*, 385 Mass. 70, 431 N.E.2d 180 (1982). Pet. 16.

The *Hudson* decision turns on the Seventh Circuit's conclusion that the statute at issue there did not provide for either an administrative hearing before a neutral body or a judicial review proceeding. 743 F.2d at 1196. In contrast, the New Jersey Act, as just shown, provides for review of the union's calculation by a review board appointed by the Governor and for judicial review of this board's determinations.[6]

In the *Greenfield* case the Massachusetts Supreme Judicial Court construed the Massachusetts agency shop statute as authorizing objecting employees to pay their contested fee into an escrow account pending an initial administrative determination of the appropriate amount. 431 N.E.2d at 189-190. We acknowledge that it is constitutionally permissible for Massachusetts to determine as a matter of State law that this approach to the problem is advisable as a matter of public policy. However, there is nothing in the *Greenfield* opinion, which was issued prior to *Ellis*, to suggest that the Massachusetts approach is the only constitutionally proper one or that the New Jersey legislature's approach of reducing nonmembers' fees by 15% and providing for publicly reviewed demand and return systems is in constitutional terms impermissible. Indeed, a holding that the Massachusetts approach is constitutionally required would be contrary to *Ellis*, 104 S.Ct. at 1890.

---

[6] The *Hudson* court also was concerned with the absence of a proper escrow arrangement, 743 F.2d at 1197, but as we have explained above, the unions here have established such arrangements. Moreover, in contrast to *Hudson*, the escrow arrangements here were implemented in addition to a statutory reduction of at least 15% in the amount of representation fees.

The petition fails entirely to demonstrate any flaw in the court of appeals' reasoning. That court's decision that the combination of an advance reduction and interest-bearing escrow accounts in the demand and return systems under consideration eliminates in practical terms the possibility of objectors being forced to loan their majority representatives money for nonchargeable activities is in complete accord with this Court's determination in *Ellis* that either "advance reduction of dues" or "interest-bearing escrow accounts" are "acceptable alternatives," 104 S.Ct. at 1890.

III. The Court of Appeals Correctly Held That An Injunction Against Collection of Representation Fees Should Not Have Issued.

a. The court of appeals followed this Court's clear and repeated declaration that in a case of this sort the one remedy that is not appropriate is an injunction that frees employees covered by a union security agreement of the obligation to provide any fiscal support to their exclusive collective bargaining representative. App. 173a-174a citing *Abood*, 431 U.S. at 240-242; *Railway Clerks* v. *Allen*, 373 U.S. 113, 119, 122 (1963); and *Machinists* v. *Street*, 367 U.S. 740, 772 (1961). As this Court explained in *Street*, any injunction restraining dues collection, "sweeps too broadly . . . [and] might well interfere with the . . . union's performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry." 367 U.S. at 771 (quoted in *Allen*, 373 U.S. at 120). Indeed, in *Abood*, even though the Michigan statute at issue had been construed by the state court as providing objectors with *no* protection against use of their fees for partisan political purposes, 431 U.S. at 232-233, this Court held that the Michigan court was correct in denying broad injunctive relief, *id.*, at 240-241.

b. There are no post-*Allen* appellate court decisions allowing the sort of injunctive relief granted by the dis-

trict court here, and those decisions which have considered this question have interpreted this Court's precedents in precisely the same way as the court below. *Champion* v. *State of California*, 738 F.2d 1082, 1084-1085 (9th Cir. 1984), *pet. for cert. filed*, No. 84-1010 (Dec. 24, 1984); *Dean* v. *Air Line Pilots*, 708 F.2d 486, 487-488 (9th Cir.), *cert. denied*, 104 S.Ct. 480 (1983). Plaintiffs err in asserting that *Perry* v. *Machinists Local Lodge 2569*, 708 F.2d 1258 (7th Cir. 1983), conflicts with the decision of the court of appeals below on this point. Pet. 19-20. In *Perry* the plaintiff was not freed of the obligation to pay agency fees, but rather was required to continue to pay those fees, albeit to the clerk of the court, *id.* at 1259-1260.[7]

c. The court of appeals relied too on the fact that the plaintiffs had not shown they would be harmed were the statute to continue to operate pending litigation of their claims:

> Moreover, the record in these consolidated appeals does not present the factual predicate for the grant of injunctive relief. One of the requirements for an injunction against a state statute is a showing that the continued operation of a statute will result in irreparable harm to the plaintiff. Necessarily, such a showing requires evidence of at least *some* harm.

---

[7] Moreover, the rebate system instituted by the union in *Perry* was found to be grossly deficient in that it was unfair, not administered in good faith and cumbersome. 708 F.2d at 1262. In contrast, the district court in this case acknowledged that the systems implemented by the unions here "constituted genuine attempts to create as effective demand and return systems as human ingenuity could devise," were among the "very best demand and return system[s]" and represented "good faith efforts . . . to create workable systems." App. 123a-124a. Finally, as we have explained more fully above, while the rebate system in *Perry* did not protect the plaintiff from being "coerced into financing the Union's political objectives," 708 F.2d 1262, the systems here, which combine a 15 percent advance reduction in charges to nonmembers with escrow arrangements for holding a portion of the reduced amount actually paid by objectors, eliminate that possibility, App. 169a-172a.

> Not only is the record devoid of any proof of actual harm suffered by the plaintiffs here, but the combination of the advanced reduction and the escrow systems adopted by the unions demonstrates the contrary. [App. 174a-175a; emphasis in original, citations omitted.]

Plaintiffs in their petition do nothing to rectify this failure to prove an essential element for injunctive relief. Of course, even if plaintiffs had attempted to overcome their failure of proof, the appellate court's conclusion on this point would not be a proper subject for this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. CHANIN
JAMES J. BRUDNEY
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
Counsel for the National Education Association

PAUL SCHACHTER
744 Broad Street
Newark, New Jersey 07102
(201) 623-1600
Counsel for Rutgers Council of AAUP

ANN H. FRANKE
1012 14th Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 737-5900
Counsel for the American Association of University Professors

JAMES B. COPPESS
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Counsel for Communications Workers of America, AFL-CIO